



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 6, 1998

Mr. Dick Gregg, Jr.
City Attorney
Gregg & Gregg
17044 El Camino Real
Clear Lake City
Houston, Texas 77058

OR98-0380

Dear Mr. Gregg:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112413.

The City of Seabrook (the "city") received a request for

1. All incident reports of the Seabrook Police Department, from October 20, 1997 to the present, concerning activity at the 2600 block of Red Bluff Road in Seabrook, a Mr. Geoffrey A. Calvert, and/or a Mr. Larry Szydle, AKA The Woodshop.
2. All Seabrook Police Department dispatch tapes for October 21, 1997.
3. All reports submitted to the Seabrook Police Department by Officers on duty or responding to duty on October 21, 1997.
4. Any memos, reports, or other information about Geoffrey or Jeffrey A. Calvert to any Seabrook Police Department official from any County, State, or Federal official.
5. Any memos, reports or other information concerning Geoffrey or Jeffrey A. Calvert between any Seabrook City officials or employees.

6. All determinations made for the Seabrook Police Department, Seabrook Water Department, and Seabrook City Manager Ronald J. Wicker by City Attorney Dick Gregg Jr. for the year 1997.

7. Any contracts, business applications required by the City of Seabrook, or other official documents involving K & G Investments and/or a Mr. Kellough or Mr. Gus.

8. Any legal determinations or opinions by Attorney Dick Gregg Jr. to any City of Seabrook official for or about K & G Investments, Mr. Kellough or Mr. Gus.

You state that you are releasing to the requestor the reports and audiotapes, or the portions of these documents, that "apply to [the requestor] or his property or the new owner."¹ You claim that the remaining requested information is excepted from disclosure under sections 552.107, 552.108, 552.109, and 552.305 of the Government Code. We have considered the exceptions you claim and have reviewed the representative sample documents you have submitted.²

Initially, we note that in your request to this office, you contend that the request in certain portions is excepted from disclosure because it is overbroad. In those instances, a governmental body must make a good faith effort to relate a request to the information which it holds, and where appropriate, ask for a clarification. Open Records Decision No. 561 (1990). Additionally, you state that some of the requested information does not exist. Chapter 552 of the Government Code applies only to information in existence and does not require a governmental body to prepare new information. Open Records Decision Nos. 605 (1992), 572 (1990), 430 (1985).

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. When communications from attorney to client do not reveal the client's communications to the

¹In addition, you refer to a "separate tape," which you submitted to this office, regarding an inquiry by a businessman regarding the property. We assume that you are releasing this tape to the requestor.

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* Moreover, the voluntary disclosure of privileged material to outside parties results in waiver of the attorney-client privilege. Open Records No. 630 (1994) at 4. We have reviewed the documents that you wish to withhold. It is not apparent to this office that the information at issue constitutes a confidential communication or contains the attorney's advice or legal opinions. Thus, we conclude that the information at issue is not the type of information that is excepted from disclosure under section 552.107 of the Government Code.

You assert that the documents submitted to this office for our review are excepted from public disclosure under section 552.108. Section 552.108 provides that

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of [s]ection 552.021 information that is basic information about an arrested person, an arrest, or a crime.

You have not explained how release of the requested information would interfere with the detection, investigation, or prosecution of crime or with law enforcement or prosecution. Nor have you demonstrated that any other provision of section 552.108 is applicable to the requested records. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have not stated that the requested information pertains to any ongoing criminal investigation or prosecution or explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. Nor have you demonstrated that any other provision of section 552.108 is applicable to the requested records. Therefore, we conclude that you may not withhold the requested dispatch tapes or reports under section 552.108.

However, upon review of the remaining information on the audio tapes submitted to this office, we conclude that certain information contained on these tapes is confidential based on the right of privacy.³ Because chapter 552 prohibits the release of confidential information and because its improper release constitutes a misdemeanor, the attorney general will raise section 552.101 in conjunction with a right of privacy on behalf of a governmental body, although the attorney general ordinarily will not raise other exceptions that a governmental body has failed to claim. See Open Records Decision Nos. 455 (1987) at 3, 325 (1982) at 1. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate or embarrassing such that its release would be highly objectionable to a person of

³We note that you have submitted to this office for review information on the audiotapes concerning the requestor, his former property, and the new owner of the property, which you indicate you are releasing to the requestor.

ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). In addition, we note that some of the information submitted to this office for review is deemed confidential by statute, the release of which may constitute a criminal offense. *See, e.g.,* Gov't Code §§ 552.117, .352. Therefore, we urge the city to exercise caution when releasing the remaining information on these tapes.

Finally, we address your assertion that some of the information on the tapes is excepted under section 552.109. Section 552.109 excepts "private correspondence or communications from an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy." Section 552.109 was designed to protect the privacy rights only of elected office holders, *see* Open Records Decision No. 473 (1987), and the common-law privacy test set out in *Industrial Foundation* should be applied, *see* Open Records Decision No. 506 (1988). You have not specifically identified, nor were we able to discern, any information on the tapes which constitute private communications from an elected office holder. Therefore, we conclude that section 552.109 is inapplicable to the responsive information at issue in this request.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous

determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/glg

Ref.: ID# 112413

Enclosures: Submitted documents

cc: Mr. Geoffrey Calvert
c/o 502 East X Street
Deer Park, Texas 77536
(w/o enclosures)